



In the Matter of:

RICHARD WOOD,

ARB CASE NO. 98-018

COMPLAINANT,

ALJ CASE NO. 97-ERA-58

v.

DATE: May 14, 1998

LOCKHEED MARTIN ENERGY SYSTEMS,

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

ORDER OF DISMISSAL

On October 28, 1997, the Administrative Law Judge (ALJ) issued a Recommended Decision and Order Granting Respondent's Motion for Summary Decision (R. D. and O.) in this matter. The ALJ concluded that the complaint was untimely under the employee protection provision of the Energy Reorganization Act (ERA), 42 U.S.C. §5851 (1994), and other environmental statutes. Complainant now has requested voluntary dismissal of his complaint, which we grant.

Complainant formerly was employed by Respondent Lockheed Martin Energy Systems at the Department of Energy's (DOE's) Oak Ridge site. He received a notice of termination from Respondent on August 26, 1996, to become effective October 25, 1996. The day after receiving the termination notice (*i.e.*, on August 27, 1996), he filed a complaint with DOE under the DOE whistleblower protection regulations. On April 22, 1997, he filed his complaint with the Department of Labor. R.D. and O. at 2.

Relying on *Chardon v. Fernandez*, 454 U.S. 6 (1981), and *Delaware State College v. Ricks*, 449 U.S. 250 (1980), the ALJ found that the alleged "discriminatory act" underlying the complaint was Respondent's issuance of the notice of termination, and that the time limitation for filing complaints under the ERA and the environmental statutes began with the date of the notice (August 26, 1996) and not the actual termination (October 25, 1996). R.D. and O. at 4. Using this August 26, 1996 date, the ALJ concluded that the April 22, 1997 complaint to the Labor Department was untimely.

In addition, the ALJ denied Complainant's request that the time limitation for filing his complaint to the Labor Department be tolled for equitable considerations, inasmuch as Complainant earlier had filed a complaint with the DOE. The ALJ offered the following analysis in denying the request:

Complainant argues that he invoked the wrong forum by filing a complaint with DOE [Department of Energy] because the concerns expressed by his protected activity in May, 1995, *i.e.*, "misstorage of nuclear weapons parts" and the alleged August, 1996 discrimination which followed were fully protected by the ERA. As further support for his contention, he avers that DOE mishandled his complaint, failed to mediate his concerns, was dilatory in responding to congressional inquiries and would not have been impartial as a "trier of fact." Significantly, Complainant does not contend that he mistakenly filed his complaint in the wrong forum nor did he offer evidence in support of such an allegation. Complainant's failure to offer any evidence in support of this allegation precludes tolling. *See* 29 C.F.R. §18.40(c) (a party opposing a motion for summary decision may not rest on mere allegations).

. . . . It is further patently clear, through Complainant's opposition, deposition and correspondence with DOE, that he became dissatisfied with DOE's failure to properly process his complaint and, for that reason, filed a complaint with DOL [Department of Labor].

Neither party has offered the complaint filed with DOE nor the precise statutory claim or remedy sought therefor, however even assuming it would have constituted a valid cause of action if timely filed with DOL, I find that Complainant can not avail himself of the principle of equitable tolling because he did not mistakenly file his initial complaint in the wrong forum.

R. D. and O. at 6 (emphasis in original).

By letter dated April 29, 1998, Complainant has requested voluntary dismissal of his complaint pending before this Board, so that he might pursue further the complaint that he had filed earlier with DOE (discussed *supra*) pursuant to 10 C.F.R. Part 708, the DOE contractor employee protection program. Complainant's letter states:

Please cancel my complaint against Lockheed Martin; [sic] If you cancel this; [sic] then the Department of Energy will reinstate my 10CFR708 complaint in which Lockheed Martin will not be able to claim time limits. Attached is the note from DOE [April 13, 1998 letter from Sandra L. Schneider, Acting Deputy Inspector General for Inspections].

Complainant's request is hereby granted, and this case is dismissed without prejudice. *Seetharaman v. Massachusetts Water Resources Authority*, ARB Case No. 98-021, ALJ Case No. 97-CAA-17, ARB Ord. of Dism., Nov. 18, 1997; *Engel v. National Radio Astronomy Observatory*,

ARB Case No. 97-067, ALJ Case No. 97-TSC-0002, ARB Ord. of Dism., Mar. 19, 1997; *Coleman v. Duquesne Light Co.*, Case No. 96-ERA-9, ARB Ord. of Dism., July 3, 1996.

SO ORDERED.

KARL J. SANDSTROM

Chair

PAUL GREENBERG

Member

CYNTHIA L. ATTWOOD

Acting Member